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No. 97-424

In The
Supreme Court Of The United States
October Term, 1997

SUPERIOR COURT, JUDICIAL DISTRICT
OF HARTFORD / NEW BRITAIN AT HARTFORD,
Petitioner,

v.

KARIN APARO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION (WITH ATTACHED APPENDIX)

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I. THE QUESTION WHETHER COLLATERAL ESTOPPEL APPLIES TO THIS CASE WAS FULLY ADJUDICATED BY THE CONNECTICUT SUPREME COURT, WAS PRESERVED IN THE PRESENT PETITIONER'S HABEAS BRIEFS, AND IS PROPERLY BEFORE THIS COURT

The respondent erroneously argues that the petitioner is precluded from raising in this Court the question whether collateral estoppel applies in the acquittal-deadlock-retrial scenario.

A. The Issue Was Raised Below

As respondent concedes, the Connecticut Supreme Court "reached the merits of the Respondent's claims and affirmed the trial court's decision that collateral estoppel did not act as a complete bar to retrial." (emphasis added) Brief in Opposition at 7, citing Connecticut v. Aparo, 223 Conn. 384, 387-88, 401-404, 614 A.2d 401 (1992).[1] The Connecticut Supreme Court fully adjudicated the question at issue, namely, whether collateral estoppel applies in the acquittal-deadlock-retrial

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[1] The Connecticut Supreme Court's opinion is set forth in the Appendix To The Petition for a Writ of Certification at pages A-28 - A-55.

scenario.

> [W]e must decide, first, whether Ashe v. Swenson, [397 U.S. 436 (1970)], applies when a jury acquits on one count of a multicount indictment and does not reach a verdict on another count. . . . Ashe involved two successive proceedings against the defendant, whereas here jeopardy continues to attach from the first trial . . . and the jury could permissibly have returned inconsistent verdicts in the first trial. . . . It may, therefore, be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues, it is arguable that the second trial is not a "future lawsuit" for Ashe purposes. The United States Supreme Court has not addressed this issue, and it is a question of first impression for this court.

State v. Aparo, 223 Conn. at 391-92 (internal citations omitted); see Appendix To Petition at A-35 - A-36. The Connecticut Supreme Court went on to reject the state's arguments, and held that collateral estoppel did apply in the acquittal-deadlock-retrial situation. Id. at 392-93; Appendix to Petition at A-36 - A-36. This Court then denied the state's Petition for a Writ of Certiorari from the state court's decision. Connecticut v. Aparo, 507 U.S. 972 (1992).

Thereafter this case reached the federal district court as

a pre-trial habeas petition by the respondent, seeking to bar the state from retrying her. In that posture, the burden was entirely on the respondent to prove that collateral estoppel could provide the remedy she sought. The petitioner opposed the habeas petition, arguing that the respondent had not met her burden, and that collateral estoppel could not be applied to bar retrial. The district court and the Court of Appeals rejected those arguments without directly addressing their merits. Instead, the federal courts held that collateral estoppel wholly precluded the state from retrying the respondent for conspiracy to commit murder.

While the petitioner had no burden in opposing the habeas petition, it never abandoned its arguments against the application of collateral estoppel to this case, although it had no basis in the federal habeas context to seek reversal of the Connecticut Supreme Court's decision. See excerpts from petitioner's brief to the Court of Appeals, appended hereto.

Given the foregoing procedural history of this case, the respondent's reliance on the "not pressed or passed upon" rule, explicated in Illinois v. Gates, 462 U.S. 213 (1983), is misplaced.

That rule is inapplicable and does not require denial or dismissal of the petition to this Court. The issue of whether collateral estoppel can be used to bar retrial has permeated this case at every stage of the proceedings. It is simply inaccurate for the respondent to now argue that the first part of the petitioner's issue was not preserved below.

B. If This Court Concludes That The Petitioner's Issue Was Not Fully Preserved Below, It Should Still Grant Certification

In Illinois v. Gates, supra, this Court identified four reasons for not considering an unpreserved question. 462 U.S. at 221-22.[2] None of these reasons precludes this Court's review in the instant case. First, the issue is a fully preserved question of law and the Connecticut Supreme Court obviously found the record fully adequate when it adjudicated the question. The state

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[2] This Court identified the four factors as: (1) the record was not adequately developed on the factual issue of good faith; (2) the state courts had not had the opportunity to consider the federal constitutional issue in the first instance; (3) the state courts had not had the opportunity to consider the question under the state constitution; and (4) the adoption of a good faith exception would modify important precedent imposing the exclusionary rule. 462 U.S. at 221-22.

did not abandon the issue in the habeas context, although it was not directly considered by either the district court or the Court of Appeals. See Section I.A, supra, and attached Appendix.

Second, the state supreme court had the opportunity to and did decide the federal constitutional question on the merits. See State v. Aparo, 223 Conn. at 388-90 (discussing collateral estoppel rule and federal case law construing Ashe v. Swenson), Appendix to Petition at A-32 - A-34. The state then promptly petitioned this Court, without success, for certiorari on the question whether collateral estoppel applied in the continuing jeopardy context.[3]

Third, the state supreme court had the opportunity to consider the question under the state constitution when it

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[3] In that petition, the state invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). Recognizing that the Connecticut Supreme Court's decision permitted it to retry the respondent, the state argued that the decision was nevertheless a final judgment because the Connecticut Court had fully adjudicated the federal question, see Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975); and that adjudication was not subject to further review in the state courts, citing Department of Banking v. Pink, 317 U.S. 264 (1942).

observed that this was an issue of first impression. It did not do so, probably because Connecticut's constitution does not contain a double jeopardy clause where state principles of collateral estoppel would be located.[4]

Finally, resolution of the issue by this Court would not modify any binding federal precedent.

As the foregoing discussion demonstrates, none of the purposes of the "pressed or passed on" rule is implicated in this case. The petitioner's first issue is properly before this Court on petition for review.

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[4] The Connecticut Supreme Court has recognized that the due process guarantees of the Connecticut constitution implicitly include the double jeopardy protection recognized at common law. State v. Rawls, 198 Conn. 111, 113 n.3, 502 A.2d 374 (1985); State v. Moeller, 178 Conn. 67,77, 420 A.2d 1153, cert. denied, 444 A.2d 950 (1979); Kohlfuss V. Warden, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928 (1962). To date, Connecticut cases have decided double jeopardy claims under the state constitution in a manner consistent with federal constitutional law. Id.; see State v. Aillon, 182 Conn. 124, 126-27 n.2, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S.Ct. 883 (1981).

II. THE ALTERNATE GROUND FOR GRANTING HABEAS RELIEF, SET FORTH IN SUBSECTION D OF THE BRIEF IN OPPOSITION, WAS NOT CONSIDERED BY THE COURT OF APPEALS AND THEREFORE WAS NOT THE BASIS OF ITS SUMMARY AFFIRMANCE

The respondent contends that, if the state is right that the jury did not necessarily find that she lacked the intent to kill, the grant of habeas relief could nevertheless be affirmed on the ground that the jury instructions collapsed the separate charges of accessory to murder and conspiracy to commit murder into a single count to which the acquittal was addressed. The Connecticut Supreme Court rejected the respondent's rather strained interpretation of the jury instructions. See State v. Aparo, 223 Conn. at 401-02 n.5; Appendix To Petition at A-45 - A-46.

The Court of Appeals never addressed this "alternate ground". Instead, it affirmed on the basis of Section I.A of the district court's ruling, which addressed only the issue of intent to kill. See Appendix to Petition at A-2, A-11 - A-22. Thus the respondent's "alternate ground" is not a reason to deny the

petition before this Court.

More importantly, the respondent's alternate argument is grounded on principles of collateral estoppel. If this Court were to grant the petition and ultimately hold that collateral estoppel does not apply in the continuing jeopardy situation, that alternate argument would have absolutely no force.

Even assuming, arguendo, that collateral estoppel is applicable, see Subsection B. of Petition; it may only bar the reuse of evidence essential to establish the acquitted count. Thus the respondent's alternate argument would still fail on the merits.

CONCLUSION

The Court should reject the respondent's arguments and should grant the petition.

Respectfully submitted,

SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD, PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE
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APPENDIX TO PETITIONER'S REPLY TO BRIEF IN OPPOSITION

EXCERPTS FROM PETITIONER'S BRIEF TO THE COURT OF APPEALS

(filed October 17, 1996)

STATEMENT OF ISSUE ON APPEAL

WHERE THE JURY AT PETITIONER'S TRIAL FOUND HER NOT GUILTY OF ACCESSORY TO MURDER BUT DEADLOCKED ON CONSPIRACY TO COMMIT MURDER, AND THE STATE SUPREME COURT HELD THAT RETRIAL OF THE CONSPIRACY CHARGE WILL NOT VIOLATE HER CONSTITUTIONAL RIGHTS, WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT RETRIAL IS WHOLLY BARRED BY PRINCIPLES OF COLLATERAL ESTOPPEL

. . . . . .

FEDERAL JURISDICTION/COMITY CONSIDERATIONS

Pursuant to 28 U.S.C. §2254, a federal court has jurisdiction to entertain an application for a writ of habeas corpus "from a person in custody pursuant to the judgment of a State court. . . " The respondent acknowledges that, while the petitioner is presently at liberty on pretrial release in the state court, nevertheless she may be deemed to have met the "in custody" requirement of 28 U.S.C. §§2241(c) and 2254(a) for purposes of this habeas corpus proceeding. See Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 300-01, 104 S.Ct. 1805 (1984); United States ex rel Scranton v. New York, 532 F.2d 292, 293-94 (2d Cir. 1976).

The present case arises, not from a final judgment of conviction, but from an ongoing state court criminal proceeding, in which the State of Connecticut seeks to retry the petitioner on the charge of conspiracy to commit murder, following a mistrial

on that charge.

In Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), the United States Supreme Court held that a federal court may not enjoin an ongoing state criminal prosecution absent the threat of great and irreparable injury. The Younger rule, known as the abstention doctrine, is not a jurisdictional prerequisite, but a rule of comity. Id. at 43-44.

A colorable double jeopardy claim, which is considered an extraordinary situation, may meet the criteria for an exception to the abstention doctrine, to allow a federal court to intervene in ongoing state court proceedings. See Justices of Boston Municipal Court v. Lydon, 466 U.S. at 304-13; Gilliam v. Foster, 75 F.3d 881, 904-05 (4th Cir. 1996)(en banc) (collecting cases); Drayton v. Hayes, 589 F.2d 117, 121 n.7 (2d Cir. 1979); United States ex rel. Scranton v. New York, 532 F.2d 292 (2d Cir. 1976) Foster v. Murphy, 686 F.Supp. 471, 474 (S.D.N.Y. 1988).[1]

---

[1] The double jeopardy clause of the fifth amendment to the United States constitution provides that no individual shall "be subject for the same offence to be twice put in jeopardy of life or limb," and affords protection from repeated prosecutions for the

This narrow exception is, however, limited to double jeopardy claims. The Younger abstention doctrine precludes federal consideration of any claim other than double jeopardy at this pretrial stage of the state proceedings. See Justices of Boston Municipal Court v. Lydon, supra, 466 U.S. at 303 n.5 (while federal court properly considered double jeopardy claim on pretrial habeas, it should not have ruled on sufficiency of evidence at first trial); Abney v. United States, 431 U.S. 651, 662-63, 97 S.Ct. 2034 (1977); (while double jeopardy claim may be raised on interlocutory direct appeal after first trial, other issues cannot be appealed at same time).

. . . . .

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same crime. Price v. Georgia, 398 U.S. 323, 326, 90 S.Ct. 1757 (1970). The double jeopardy provision of the fifth amendment is applicable through the fourteenth amendment to individuals prosecuted in state courts. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056 (1969).

Strictly speaking, retrial after deadlock/mistrial is a continuing jeopardy situation that does not implicate double jeopardy. United States v. Sanford, 429 U.S. 14, 97 S.Ct. 20 (1976); see 3 W. LaFave & J. Israel, Criminal Procedure, p. 75 (1984 ed). See text, infra, for a discussion and application of principles of double jeopardy and collateral estoppel.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT RETRIAL OF THE CONSPIRACY COUNT WAS BARRED BY THE COLLATERAL ESTOPPEL ASPECT OF THE DOUBLE JEOPARDY CLAUSE

A. Double Jeopardy Is Not Implicated Because Original Jeopardy Never Terminated On The Mistried Conspiracy Count Even Though The Same Jury Acquitted The Petitioner On The Accessory to Murder Count

The double jeopardy clause of the fifth amendment provides that no individual shall "be subject for the same offence to be twice put in jeopardy of life or limb." The prohibition "relates to a potential, i.e., the risk that an accused for a second time will be convicted of the `same offence' for which he was initially tried." Price v. Georgia, 398 U.S. at 326; United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075 (1976).

It is well-established that retrial following a jury deadlock does not violate the constitutional provision against double jeopardy. Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081 (1984). "[A] trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy

to which [the defendant] was subjected." Id. at 326. This is so even when a defendant has been acquitted on another count by the same jury that has failed to reach a verdict on the mistried count. Id. at 318-19, 325-26; United States v. Farmer, 923 F.2d 1557, 1563 (11th Cir. 1991); United States v. Gornto, 792 F.2d 1028 (11th Cir. 1986); United States v. DeVincent, 632 F.2d 155 (1st Cir. 1980); United States v. Burkett, 612 F.2d 449 (9th Cir. 1979), cert. denied, 447 U.S. 905 (1980).

It is also well-established that a substantive crime and a conspiracy to commit that substantive crime are not the "same offence" for purposes of the double jeopardy clause, even where both offenses arise out of the same underlying incident. Pinkerton v. United States, 328 U.S. 640, 643 (1946); accord, United States v. Felix, 503 U.S. 378, 389-91, 112 S.Ct. 1377 (1992); see United States v. Clark, 613 F.2d 391, 400 (2d Cir. 1979); United States v. McGowan, 58 F.3d 8, 13 (2d Cir. 1995).

The petitioner in this case was charged with being an accessory to murder and with conspiracy to commit murder. Accessorial liability "mak[es] the defendant a principal when he

consciously shares in a criminal act regardless of the existence of a conspiracy." Periera v. United States, 347 U.S. 1, 11, 74 S.Ct. 358 (1954); United States v. Virella, 750 F.Supp. 111, 115-16 (S.D.N.Y. 1990).

Conspiracy, on the other hand, is an inchoate offense, the gravamen of which is an agreement to commit an unlawful act. Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284 (1975). In order to be guilty of a conspiracy, a defendant need not have actual knowledge of the occurrence of the substantive act; he must, however, make the agreement to commit a specific crime, know the essential nature and object of the conspiracy, and possess the requisite intent. Id.; State v. Beccia, 199 Conn. 1, 3, 505 A.2d 683 (1986).

An illegal agreement, the essence of a conspiracy charge, is not an element of the charge of accessory to murder in Connecticut.

> The underlying substantive offense, whether it be regarded as that of accessory or as that of principal to the [substantive] charge, while it may evince a conspirator's participation in the illegal agreement, does not constitute an element of the conspiracy charge. Thus the

> defendant's [acquittal], . . . as an accessory ..., does not turn at all upon the illegal agreement essential to the conspiracy.

State v Johns, 184 Conn. 369, 379, 439 A.2d 1049 (1981).[2]

In light of this precedent, there is no question that the two charges against the petitioner were legally distinct and different offenses. See Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932). A jury can acquit a defendant of accessory to murder, yet find her guilty of conspiracy in the same trial. And double jeopardy does not preclude the state from obtaining the two verdicts in separate trials instead of a single one. United States v. Richardson, supra.

B. Collateral Estoppel Does Not Preclude Retrial Of The Conspiracy Count

1. Principles of collateral estoppel

In the criminal prosecution context, collateral estoppel, also known as issue preclusion, is embodied in the constitutional

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[2] To prove an agreement, the state need not establish that there was a formal agreement; it is sufficient to prove that the parties "are knowingly engaged in a mutual plan to do a forbidden act." State v. Johns,, 184 Conn. at 378 (internal citation and quotation marks omitted).

protection against double jeopardy. Ashe v. Swenson, 397 U.S. 436, 445, 90 S.Ct. 1189 (1970). "Collateral estoppel . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443.[3]

Collateral estoppel may bar the relitigation of ultimate facts necessarily established in a defendant's favor in a prior proceeding, or it may completely bar a subsequent prosecution

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[3] The mere fact that evidence was used in a prior trial does not automatically trigger a collateral estoppel bar to retrial or to use of the same evidence in a second trial. Prior acquitted conduct may be used in a subsequent trial if it is probative, unless the legal issue regarding the conduct is identical to the issue in the first trial and was decided in the defendant's favor. See United States v. Felix, supra (prosecution not precluded from using overlapping evidence in successive prosecution of conspiracy and substantive crime); Dowling v. United States, 493 U.S. 342, 348, 110 S.Ct. 668 (1990) (prior acquitted conduct relevant and admissible in second trial where not offered as evidence of ultimate fact); Yates v. United States, 354 U.S. 298, 337-38, 77 S.Ct. 1064 (1957); United States v. Dray, 901 F.2d 1132, 1138 (1st Cir.), cert.denied, 498 U.S. 895 (1990); United States v. Davis, 809 F.2d 1194 (6th Cir. 1987); Flittie v. Solem, 751 F.2d 967, 972 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986).

where an ultimate fact necessarily determined in the former trial is an essential element at the second trial. United States v. DeMarco, 791 F.2d 833, 836 (11th Cir. 1986); see United States v. Mespoulede, 597 F.2d 329, 336 (2d Cir. 1979)(collateral estoppel bars government from relitigating ultimate fact that was decided in defendant's favor by partial verdict).[4] The United States Supreme Court has not yet directly addressed the issue of whether collateral estoppel applies in a case of continuing jeopardy, such as the instant case.[5]

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[4] To the extent that Mespoulde held that collateral estoppel bars relitigation of mere evidentiary facts, it has been partially overruled by Dowling v. United States, 493 U.S. 342, 348-49, 110 S.Ct. 668 (1990).

[5] Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970), arose in the habeas context, but it was a successive prosecution case, and did not involve the continuing jeopardy situation at issue here. In Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984), the Court in dicta distinguished Ashe from cases of simultaneous prosecution of charges, stating: "[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9. Johnson involved a guilty verdict to one count followed by the defendant's attempt to bar continued prosecution on the remaining counts.

In this circuit, this Court has held in the direct appeal

(continued...)

The burden of establishing that collateral estoppel applies is on the defendant. Dowling v. United States, 493 U.S. 342, 350, 110 S.Ct. 668 (1990). The defendant must demonstrate that the fact or issue to be foreclosed was necessarily decided in his or her favor. United States v. Mespoulede, supra; United States v. Citron, 853 F.2d 1055, 1058 (2d Cir. 1988); United States v. Seijo, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977); United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975). Because the basis for a jury's general verdict usually cannot be determined with certainty, the defendant's burden is a heavy one. United States v. Clark, 613 F.2d 391, 400 (2d Cir. 1979), cert. denied, 449 U.S. 820 (1980); United States v. Seijo, supra; see United States v. Boldin, 818 F.2d 771, 775 (11th Cir. 1987) (burden on collateral estoppel claimant is by "convincing

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(...continued)
context that collateral estoppel is applicable to bar relitigation of ultimate facts decided in a defendant's favor by a partial verdict (acquittal/deadlock). United States v. Mespoulede, 597 F.2d at 336. In the present case, the Connecticut Supreme Court followed the reasoning of Mespoulede on this point. State v. Aparo, 223 Conn. at 392-93.

and competent evidence").

It is not enough for a defendant to show that the issue may have been determined in his favor at the previous trial. Where the verdict is ambiguous, or where it is not possible to determine conclusively whether a particular issue or ultimate fact was previously resolved in a defendant's favor, estoppel will not apply. United States v. Dray, 901 F.2d at 1136; United States v. Gonzalez-Sanchez, 825 F.2d 572, 583-84 (1st Cir.), cert. denied, 484 U.S. 989 (1987); United States v. Boldin, supra; United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). United States v. Medina, 563 F.Supp. 979 (S.D.N.Y.), aff'd, 709 F.2d 155 (2d Cir. 1983).

A reviewing court must "examine the record of the prior proceeding . . . and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose. . . ." Ashe v. Swenson, 397 U.S. at 444 (emphasis added). Because an acquittal rendered by a general verdict might be based on a failure of proof on only one essential element, it cannot be automatically assumed that the

jury found against the state on every single element or evidentiary fact. Unites States v. Irvin, 787 F.2d 1506, 1515 (11th Cir. 1986); United States v. DeVincent, 632 F.2d at 160. "'[S]ince it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case, it is a rare situation in which the collateral estoppel defense will be available to a defendant.'" United States v. Citron, 853 F.2d at 1058, quoting United States v. Tramunti, supra.[6] This Court has held that a subsequent prosecution is barred by collateral estoppel "only when previously prosecuted conduct will be used to establish the entirety of an element of the second crime." United States v. Gannon, 967 F.2d 40, 45 (2d Cir.), cert. denied,

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[6] Collateral estoppel is generally less available in criminal cases than in civil actions, "because considerations peculiar to the criminal process may outweigh the need to avoid repetitive litigation." Pinckney v. Keane, 920 F.2d 1090, 1096 (2d Cir. 1990), cert. denied, 501 U.S. 1217 (1991). These considerations include the state's compelling interest in the enforcement of the criminal law, and the public's interest in the accuracy and justice of the results in criminal trials. Id. at 1097; accord, People v. Goodman, 69 N.Y.2d 32, 503 N.E.2d 996, 1000 (1986); see United States v. Citron, 853 F.2d at 1058 (collateral estoppel rarely available to criminal defendant).

113 S.Ct. 655 (1992).

A reviewing court should examine all parts of the record of the prior proceeding in order to determine whether a rational jury could have grounded its decision on an issue other than that which the defendant seeks to foreclose. Ashe v. Swenson, 397 U.S. at 443-45. The court's inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237 (1948).

. . . . .